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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Tom Kueneman,

Plaintiff,

vs.

Davy Vandeputte, JOHN DOE 1 a/k/a
BATRASTARD PANTHAR, and JOHN DOE
2 a/k/a SHANE NEILSON

Defendants.

Case No. C 14 00564 LB

**PLAINTIFF'S EX PARTE MOTION FOR
ALTERNATE SERVICE OF PROCESS
UNDER FEDERAL RULE OF CIVIL
PROCEDURE 4(f)(3)**

I. INTRODUCTION AND RELIEF REQUESTED

Plaintiff Tom Kueneman ("Plaintiff"), through counsel, hereby moves this Court pursuant to Federal Rule of Civil Procedure 4(f)(3) for an order permitting Plaintiff to effect service on Defendant Davy Vandeputte ("Vandeputte") through electronic mail ("email") or in the alternative authorizing service through any form of postal mail that the clerk addresses and sends to Vandeputte that requires a signed receipt.

II. FACTUAL BACKGROUND

This is a copyright infringement action against Vandeputte and John Doe 1 a/k/a Batrastard Panthar and John Doe 2 a/k/a Shane Neilson (collectively, "the John Doe

1 Defendants”)¹ based on conduct within the Second Life virtual world platform hosted by Linden
2 Research, Inc. d/b/a Linden Lab. In order to effect the removal of the infringing content,
3 Plaintiff served a Digital Millennium Copyright Act (“DMCA”) Notification, pursuant to 17
4 USC § 512(c)(3) relating to all three defendants. (Dkt. No. 1, Compl., Ex. C.)

5 Vandeputte responded with a DMCA Counter-Notification under 17 U.S.C. §51(g)(3).
6 (Dkt. No. 1, Compl. Ex. A.) In Vandeputte’s DMCA Counter-Notification, Vandeputte provided
7 a mailing address in Belgium, but consented to the jurisdiction of this Court and agreed to accept
8 service of process from the Plaintiff. (Dkt. No. 1, Compl. Ex. A.) In addition, Vandeputte’s
9 DMCA Counter-Notification also provided an email address as a method of contact, although
10 that was not required by the DMCA. (Dkt. No. 1, Compl. Ex. A.) Additionally, Vandeputte has
11 corresponded with Plaintiff’s counsel by email to tender a settlement offer. (Humphries Decl. ¶
12 7.)
13

14 Plaintiff also notes that Vandeputte has demonstrated that he is conversant in the English
15 language. First, he does business within the Second Life virtual world platform in English and
16 his access to the Second Life platform is governed by the Linden Lab Terms of Service and other
17 documents which are only available in the English language. (Humphries Decl. ¶ 3.) Further,
18 Vandeputte’s Counter-Notification and settlement offer to Plaintiff (extended after receiving an
19 English copy of the Complaint filed in this matter from Linden Lab) were both in English and
20 indicated a solid grasp of the language and an understanding of the claims being asserted against
21 him. (Dkt. No. 1, Compl Ex. A and Humphries Decl. ¶ 7.) Therefore, Plaintiff does not believe
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26 ¹ Plaintiff has not ascertained the full identity of the John Doe Defendants, although Plaintiff’s
27 counsel believes that Vandeputte is in possession of that information - based on communication
28 received from Vandeputte. (Humphries Decl. ¶ 7.) At this time, Plaintiff intends to serve
process on Vandeputte and use formal discovery procedures to ascertain the full identities of the
John Doe Defendants through Vandeputte. (Humphries Decl. ¶ 8.)

1 that Vandeputte requires the translation of any documents to have a full understanding of the
2 documents.

3 **III. ARGUMENT**

4 Service of process upon Vandeputte must accord with Rule 4(f) of the Federal Rules of
5 Civil Procedure ("Rule 4(f)"). Although Rule 4(f) provides multiple methods for service, Rule
6 4(f)(3) authorizes the Court to craft a method of service of process that is reasonably calculated
7 to give notice to this particular defendant. "Court-directed service under Rule 4(f)(3) is as
8 favored as service available under Rule 4(f)(1) or Rule 4(f)(2)," and availability of such service
9 is not contingent on first attempting service of process by other means. Rio Properties, Inc. v.
10 Rio International Interlink, 284 F.3d 1007, 1015 (9th Cir. 2002). Based on the circumstances of
11 this case, Plaintiff believes that court-directed service of an alternative method, namely service
12 by email, under Rule 4(f)(3) is more efficient than the specific methods of service provided in
13 Rule 4(f).
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15 Court-directed service under Rule 4(f)(3) is permissible if the method of service is not
16 prohibited by international agreement and comports with the requirements of due process. See
17 Rio Properties, 284 F.3d at 1015 & 1016-1017. Counsel is not aware of any international
18 agreement prohibiting service by email, and in fact, the Ninth Circuit has explicitly recognized
19 that service of process by email is an appropriate alternate method where the trial court balances
20 the limitations of email service against its benefits. Id. at 1017. In the present case, Vandeputte
21 has elected to use email as his method of communicating with Plaintiff's counsel. Moreover, the
22 conduct providing the basis for Plaintiff's claims demonstrates that Vandeputte is extremely
23 technologically capable. Therefore, given that Vandeputte has consented to the jurisdiction of
24 this Court, has agreed to accept service from the Plaintiff, and has already communicated with
25 counsel for Plaintiff by email, service of process by email is reasonable under the circumstances.
26 Such service is reasonably calculated to apprise Vandeputte of the pendency of the action and to
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1 afford him with the opportunity to respond, as required to comport with the requirements of due
2 process.

3 Furthermore, given Vandeputte's demonstrated understanding of the English language,
4 Plaintiff asserts that all documents served may be served in English and comply with the
5 principles of due process. Based on Vandeputte's offer of settlement after Linden Lab informed
6 counsel it had forwarded the Complaint to him, it appears that Vandeputte has already received a
7 copy of the Complaint in English and extended a settlement offer based on the language therein.
8 (Humphries Decl. ¶¶ 6-7.) Further, all of the communications counsel have received from
9 Vandeputte have been in English. (Humphries Decl. ¶¶ 5 & 7.) Therefore, due process does not
10 require the translation of the documents into another language in order for Vandeputte to receive
11 the notice and opportunity required for due process.
12

13 In the event that the Court does not authorize service by email, Plaintiff respectfully
14 requests entry of an order explicitly authorizing service by "any form of mail that the clerk
15 addresses and sends to the individual and that requires a signed receipt" as provided in Rule
16 4(f)(2)(C)(ii). Rule 4(f)(2) permits service to be accomplished, if an international agreement
17 allows but does not specify other means, by a method that is reasonably calculated to give notice:
18 (1) as prescribed by the foreign country's law; (2) as directed by the foreign country in response
19 to a letter rogatory or letter of request; and, unless prohibited by the foreign country's law by: (3)
20 personal delivery or (4) any form of mail addressed by the clerk and requiring a signed receipt.
21 Article 10(a) of the Hague Service Convention allows for the sending of "judicial documents, by
22 postal channels, directly to persons abroad," as long as the destination state does not object. Like
23 the United States, Belgium is a signatory to the Hague Service Convention, but has not objected
24 to Article 10(a). (Humphries Decl. ¶ 9 and Exhibit 2.) Therefore, in the alternative to email,
25 Plaintiff's counsel requests authorization for service by "using any form of mail that the clerk
26 addresses and sends to the individual and that requires a signed receipt" under Rule
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1 4(f)(2)(C)(ii). Again, Plaintiff asserts that documents need not be translated for service, given
2 Vandeputte's demonstrated comprehension of the English language.

3 WHEREFORE, based on the foregoing, Plaintiff respectfully requests that the Court
4 enter an order granting this Motion and authorizing service on Defendant Davy Vandeputte by
5 email, or in the alternative by international certified mail address by the clerk.

6 Respectfully submitted,

7 Dated: May 1, 2014

OWEN, WICKERSHAM & ERICKSON, P.C.

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10 By 

11 Lawrence G. Townsend
12 Lindsey B. Furtado

13 Attorneys for Plaintiff
14 TOM KUENEMAN
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CERTIFICATE OF SERVICE

I, B.C. Dunne, am employed in the City and County of San Francisco, State of California, am over the age of eighteen; and not a party to this action. My business address is 455 Market Street, 19th Floor, San Francisco, California 94105. I am readily familiar with the business practice at my place of business for processing of correspondence and documents by mail with the United States Postal Service, by overnight delivery through an overnight service, by personal delivery through a courier service, by facsimile, and/or by email.

On the date below, I served the following document(s):

PLAINTIFF'S EX PARTE MOTION FOR ALTERNATE SERVICE OF PROCESS UNDER FEDERAL RULE OF CIVIL PROCEDURE 4(f)(3);

DECLARATION OF CHRISTINA B. HUMPHRIES I SUPPORT OF PLAINTIFF'S EX PARTE MOTION FOR ALTERNATE SERVICE OF PROCESS UNDER FEDERAL RULE OF CIVIL PROCEDURE 4(f)(3); and

[PROPOSED] ORDER GRANTING PLAINTIFF'S EX PARTE MOTION FOR ALTERNATE SERVICE OF PROCESS UNDER FEDERAL RULE OF CIVIL PROCEDURE 4(f)(3)

on the person(s) listed below:


By Email (dvandeputte1@gmail.com) & USPS:

Davy Vandeputte
Krapstraat 1008
9255 Buggenhout
BELGIUM

X BY U.S. MAIL: Such correspondence was deposited, with postage fully prepaid, with the United States Postal Service, at San Francisco, California, on the same day in the ordinary course of business.

X BY EMAIL: The document was transmitted via email in the form of .pdf attachment or other readable document.

I declare, under penalty of perjury under the laws of the United States, that the foregoing is true and correct. Executed on May 1, 2014, at San Francisco, California.



B. C. Dunne